



RECEIVED

BellSouth Telecommunications, Inc
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

guy.hicks@bellsouth.com

2004 SEP 22 PM 1:59

SEP 22 2004
TBA DOCKET ROOM

Guy M. Hicks
General Counsel

615 214 6301
Fax 615 214 7406

VIA HAND DELIVERY

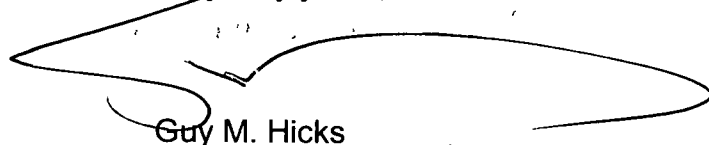
Hon. Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *BellSouth's Withdrawal of its Statement of Generally Available Terms
and Conditions*
Docket No. 04-00261

Dear Chairman Miller:

Enclosed are the original and fourteen copies of BellSouth's *Response to CompSouth's Motion to Deny BellSouth's Request to Withdraw Statement of Generally Available Terms*. Copies of the enclosed are being provided to counsel of record.

Very truly yours,



Guy M. Hicks

GMH:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *BellSouth's Withdrawal of its Statement of Generally Available Terms and Conditions*

Docket No. 04-00261

**BELLSOUTH'S RESPONSE TO COMPSOUTH'S
MOTION TO DENY BELLSOUTH'S REQUEST TO
WITHDRAW STATEMENT OF GENERALLY AVAILABLE TERMS**

BellSouth Telecommunications, Inc. ("BellSouth") hereby responds to the Competitive Carriers of the South, Inc.'s ("CompSouth") Motion to Deny BellSouth's Request to Withdraw Statement of Generally Available Terms ("Motion to Deny") and letter of August 31, 2004 regarding the Federal Communications Commission's ("FCC") Interim Rules.

For a number of reasons, CompSouth's Motion to Deny should itself be denied: (1) By virtue of the FCC's *Interim Order*,¹ no Tennessee CLEC can now elect to take service pursuant to the SGAT; (2) there will be no impact on the business operations of any CLEC, including specifically the members of CompSouth, since no CLEC operating in Tennessee is being provided service under the SGAT; and (3) finally, there is no legal requirement that BellSouth maintain an SGAT.

¹ On August 20, 2004, in its Order and Notice of Proposed Rule Making ("NPRM") in CC Docket No. 01-338, (Order No. FCC 04-179) the Federal Communications Commission ("FCC") released its interim rules in response to the United States Court of Appeals for the District of Columbia's March 2, 2004 Order in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). As will be explained further herein, the FCC's interim rules clearly state that the elements that were vacated by the D.C. Circuit Court have not been reinstated. The FCC also imposed a 6-month freeze on the CLECs' access to the vacated elements, including prohibiting CLECs from opting into agreements (or SGATs) that contain the vacated elements. See FCC Order and NPRM, CC Docket No. 01-338, at fn. 5 and para. 22-23.

I. BACKGROUND

By letter dated August 17, 2004, BellSouth notified the Authority that, due to the March 2, 2004 mandate issued by the United States Court of Appeals for the District of Columbia Circuit in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), the SGAT that BellSouth submitted previously no longer reflected the current state of the law. Because of that fact, the SGAT no longer contained "a statement of the terms and conditions that [BellSouth] generally offers" to CLECs operating in Tennessee. Thus, BellSouth notified the Authority that it was withdrawing the SGAT lest some carrier attempt to evade the effect of the Court of Appeals' *USTA II* decision by "accepting" terms and conditions that BellSouth neither generally offers nor can lawfully be required to offer.

II. THE MOTION TO DENY SHOULD BE REJECTED

CompSouth has apparently adopted a policy of total denial of the fact that *USTA II* has rendered much of the FCC's pre-existing interconnection and unbundling scheme unlawful. Rather than accepting this fact, CompSouth urges the Authority to perpetuate that unlawful scheme through an outdated SGAT that none of its members subscribe to and which does not comply with Section 251 of the Federal Act. For the following reasons, the Authority should not permit this thinly-veiled effort to require BellSouth to continue to offer services that are not required under current law.

First, under the Interim Order,² ILECs have a continuing obligation to provide unbundled access to mass market local circuit switching, enterprise market loops and dedicated transport under the rates, terms and conditions that applied under their interconnection agreements (and SGATs) *as of June 15, 2004*. (Interim Order, ¶ 21). BellSouth cannot and does not dispute that this is what the FCC has ordered. However, it is equally beyond dispute that the FCC has determined that no CLEC can now elect to take service by adopting Interconnection Agreements or SGATs that include vacated elements. The Interim Order states unequivocally that the elements vacated by the D.C. Circuit Court have not been reinstated. Instead, the FCC imposed a 6-month freeze on the CLECs' access to the vacated elements pursuant to the terms and conditions under which they were being provided service (either in an agreement or SGAT) as of June 15, 2004. Since no CLEC in Tennessee had adopted or even sought to adopt the SGAT as of June 15, 2004, the FCC's reference to carriers taking service under such an SGAT is meaningless in Tennessee.

This is not merely a matter of conjecture. The FCC expressly declined to permit existing CLECs to expand their rights as of June 15, 2004 by subsequently opting into agreements or SGATs that contain the vacated elements. See FCC Order and NPRM, CC Docket No. 01-338 at fn. 5 and para. 22-23 ("We also hold that competitive LECs may not opt into the contract provisions 'frozen' in place by

² In footnote 5 of the *Interim Order*, the FCC stated

Throughout this Notice and Order, references to an incumbent LEC's obligations under its interconnection agreements apply also to obligations set forth in the incumbent LEC's applicable statements of generally available terms (SGATs) and relevant state tariffs

this interim approach. The fundamental thrust of the interim relief provided here is to maintain the *status quo* in certain respects without expanding unbundling beyond that which was in place on June 15, 2004. ... Most significantly, the interim approach forecloses the implementation and propagation of the vacated rules.”) (emphasis in original). BellSouth’s SGAT contains those vacated elements and pursuant to the clear mandate of the FCC, no CLEC can adopt the SGAT that BellSouth is withdrawing.

Second, even if the FCC’s Interim Order didn’t directly address this matter, as a matter of law, the SGAT BellSouth previously filed no longer complies with Section 251 of the 1996 Act, and that mandates its withdrawal. Section 252(f)(1) of the 1996 Act provides that an SGAT is a general offering of terms and conditions that “comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.”³ No serious dispute exists that the SGAT does not comply with the requirements of Section 251 of the 1996 Act, because it implemented provisions of the FCC’s Triennial Review Order that were subsequently invalidated by the D.C. Circuit Court of Appeals in *USTA II*. Thus, not only is withdrawal appropriate, *it is required*.

³ Section 252(f)(1) of the Telecommunications Act of 1996 (“the Act”), 47 U.S.C §252(f)(1), provides

A Bell operating company *may* prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State *to comply with the requirements of section 251* and the regulations thereunder and the standards applicable under this section.

47 U S C §252(f)(1) (emphasis added)

Third, and putting aside the clear legal arguments as to why CompSouth is simply wrong, there will be no impact whatsoever on the business operations of any CLEC based on BellSouth's withdrawal of its SGAT. Indeed, no CLEC in Tennessee purchases services from the SGAT, and no CLEC in Tennessee has ever adopted (or sought to adopt) the SGAT. In fact, it is entirely probable that CompSouth lacks standing to file its Motion to Deny since CompSouth's members have their own interconnection agreements with BellSouth and, consequently, no member of CompSouth purchases any services under SGAT in Tennessee. In the final analysis, from a practical standpoint, neither the members of CompSouth nor any other CLEC can demonstrate any harm resulting from withdrawal of the SGAT.

Finally, there is no requirement that BellSouth even maintain an SGAT under any circumstances. See 47 U.S.C. § 252(f)(1) ("A Bell operating company *may* prepare and file with a State commission" an SGAT) (emphasis added). To the extent BellSouth decides to offer an SGAT, that offering must "comply with the requirements of section 251 and the regulations thereunder," as explained above.

CompSouth's statement that "BellSouth relied on the fact that it had an approved SGAT on file with the Authority ..." in connection with its application for long distance authority (CompSouth Motion to Deny at p. 2) is completely irrelevant and is in fact wrong. It is clear that BellSouth's SGAT was approved by the Authority, not as a prerequisite to BellSouth's application for interLATA long distance authority under Section 271 of the 1996 Act but rather in supplement

thereto.⁴ Specifically, BellSouth's application for in-region, interLATA long distance authority in Tennessee was made and approved under the "Track A" provisions of Section 271 of the 1996 Act, 47 U.S.C. §271(c)(1)(A),⁵ which does not require even the submission of an SGAT, much less the maintenance of one. The Authority's approval of BellSouth's SGAT was in addition to the Authority's finding of BellSouth's compliance with "Track A" and the Competitive Checklist. *See Advisory Opinion* recommending Section 271 approval dated October 4, 2001. The Authority also expressly found that BellSouth satisfied the fourteen (14) point competitive checklist contained in Section 271(c)(2)(B)(i)-(xiv) of the federal Act.

CompSouth's suggestion that BellSouth must maintain an SGAT in order to continue meeting its obligations under the competitive checklist of Section 271 is also without merit. Nothing in Section 271 requires that BellSouth maintain an SGAT. Furthermore, the SGAT does not reflect BellSouth's current Section 271 obligations. For example, the SGAT would have allowed CLECs to obtain certain unbundled network elements ("UNEs") at Total Element Long Run Incremental Cost ("TELRIC") rates, even though the D.C. Circuit Court of Appeals has held that such

⁴ The Authority approved the SGAT as being consistent with Section 251, by *Order Approving Revisions to the Statement of Generally Available Terms of BellSouth* in BellSouth's Section 271 Application proceeding (Docket No. 97-00309). At that time, it was contemplated that CLECs might opt into the SGAT to avoid separate negotiations with BellSouth. As stated, no CLEC in Tennessee has ever sought to adopt the SGAT in lieu of an interconnection agreement.

⁵ *See Authority Advisory Opinion*, dated October 10, 2003, recommending approval of BellSouth's Section 271 application, Docket No. 97-00309, at pp. 23. ("The Authority voted unanimously that BellSouth satisfies the Track A requirements contained in Section 271(c)(1)(A) of the Act."). *See also* Federal Communications Commission ("FCC") *Memorandum Opinion and Order*, WC Docket No. 02-302 (BellSouth's Application for Provision of In-Region, InterLATA Services in Florida and Tennessee (released December 19, 2002), at para. 9 ("We conclude, as did the state commissions, that BellSouth satisfies the requirements of Track A in Florida and Tennessee. No commenter challenges BellSouth's showing in that respect.") Significantly, the FCC did not discuss Track B or an SGAT, because BellSouth did not rely on either in submitting its Section 271 Application to the FCC.

elements do not satisfy the “impairment test” so as to warrant unbundling. The FCC has held, however, that network elements offered under Section 271 that do not have to be unbundled are not subject to TELRIC pricing. *Triennial Review Order*, ¶¶ 656-54, *aff’d*, 359 F.3d at 589. Likewise, the SGAT would have allowed a CLEC to obtain combinations of elements offered under Section 271. The FCC has, however, held that an incumbent has no obligation to combine network elements offered under Section 271 that do not have to be unbundled. *Id.*, ¶¶ 652, 654, *aff’d*, 359 F.3d at pp. 589-590.

Perhaps the most telling reason why CompSouth’s motion should be denied is the fact that it is based on CompSouth’s specious claim that an SGAT is of “critical importance” to competition in Tennessee. (Motion to Deny at p. 3) If it is of such critical importance, as CompSouth claims, where are the CLECs that are relying on the SGAT? CompSouth does not, and cannot, point to a single CLEC in Tennessee that is operating under (or has asked to operate under) the SGAT.

There is no need for the Authority to expend its time and effort, as CompSouth requests, to “investigate” the SGAT to determine “what changes are appropriate.” (Motion to Deny at p. 5) CompSouth’s request that the Authority deny BellSouth’s withdrawal of its SGAT is clearly without merit. If and when BellSouth chooses to file a new SGAT, it will submit a new SGAT for the Authority’s review in accordance with Section 252(f) of the Act.⁶

⁶ CompSouth’s statement that BellSouth’s withdrawal of its SGAT is somehow in breach of its “commitment that it would not unilaterally implement changes to its interconnection agreements with CLECS” (Motion to Deny at p. 3) is patently wrong and defies logic. Withdrawal of the SGAT will not affect any of the rates, terms and conditions upon which any CLEC in Tennessee receives service today.

III. CONCLUSION

Granting the relief that CompSouth seeks would be inconsistent with the FCC's *Interim Order* and would contravene the plain language of Section 252(f) by requiring that BellSouth maintain an SGAT that does not "comply with the requirements of section 251 and the regulations thereunder" CompSouth's Motion is without merit. Accordingly, the Authority should reject the Motion to Deny.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: 

Guy M. Hicks
Joelle J. Phillips
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

R. Douglas Lackey
James Meza
BellSouth Center, Suite 4300
675 West Peachtree Street, N.E.
Atlanta, Georgia 30375

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2004, a copy of the foregoing document was served on the parties of record, via hand delivery, facsimile, overnight or US Mail, addressed as follows:

<input type="checkbox"/> Hand	Charles B. Welch, Esquire
<input type="checkbox"/> Mail	Farris, Mathews, et al.
<input type="checkbox"/> Facsimile	618 Church Street, #300
<input type="checkbox"/> Overnight	Nashville, TN 37219
<input checked="" type="checkbox"/> Electronic	cwelch@farrismathews.com for Time Warner and New South

<input type="checkbox"/> Hand	Henry Walker, Esquire
<input type="checkbox"/> Mail	Boult, Cummings, et al.
<input type="checkbox"/> Facsimile	P. O. Box 198062
<input type="checkbox"/> Overnight	Nashville, TN 37219-8062
<input checked="" type="checkbox"/> Electronic	hwalker@boultcummings.com for XO Communications, ICG, ACSI (e.spire), Brooks Fiber, SECCA and US LEC

<input type="checkbox"/> Hand	Dulaney O'Roark, Esquire
<input type="checkbox"/> Mail	MCI WorldCom, Inc.
<input type="checkbox"/> Facsimile	Six Concourse Pkwy, #3200
<input type="checkbox"/> Overnight	Atlanta, GA 30328
<input checked="" type="checkbox"/> Electronic	de.oroark@wcom.com

<input type="checkbox"/> Hand	Martha Ross-Bain
<input type="checkbox"/> Mail	AT&T
<input type="checkbox"/> Facsimile	1200 Peachtree St., NE, #4068
<input type="checkbox"/> Overnight	Atlanta, GA 30367
<input checked="" type="checkbox"/> Electronic	rossbain@att.com for AT&T and TCG MidSouth

<input type="checkbox"/> Hand	John McLaughlin, Jr.
<input type="checkbox"/> Mail	KMC Telecom
<input type="checkbox"/> Facsimile	1755 North Brown Road
<input type="checkbox"/> Overnight	Lawrenceville, GA 30043
<input checked="" type="checkbox"/> Electronic	john.mclaughlin@kmctelecom.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Enrico C. Soriano
Kelley, Drye & Warren
1200 19th St., NW, #500
Washington, DC 20036
esoriano@kelleydrye.com
for XO Communications

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Ed Phillips, Esq.
United Telephone - Southeast
14111 Capitol Blvd.
Wake Forest, NC 27587
ed.phillips@mail.sprint.com
for Sprint Communications, LP

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Guilford Thornton, Esquire
Stokes & Bartholomew
424 Church Street
Nashville, TN 37219
gthornton@stokesbartholomew.com
for BSLD

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Donald L. Scholes
Branstetter, Kilgore, et al.
227 Second Ave., N.
Nashville, TN 37219
dscholes@branstetterlaw.com
for CWA

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

James Murphy, Esquire
Boult, Cummings, et al.
P. O. Box 198062
Nashville, TN 37219-8062
jmurphy@boultcummings.com
for MCI WorldCom

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Andrew Klein, Esquire
Kelley, Drye & Warren
1200 19th St., NW
Washington, DC 20036
aklein@kelleydrye.com
for KMC Telecom

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

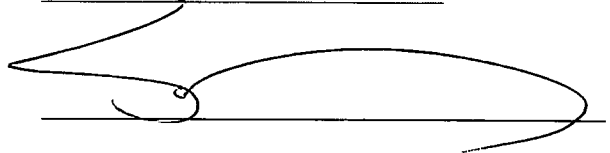
☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

D. Billye Sanders, Esquire
Waller Lansden, et al.
P. O. Box 198866
Nashville, TN 37219-8966
bsanders@wallerlaw.com
for SBC Telecom

Russell Perkins, Esquire
Consumer Advocate Division
P. O. Box 20207
Nashville, TN 37202
russell.perkins@state.tn.us

Nanette S. Edwards, Esquire
ITC^DeltaCom
4092 South Memorial Parkway
Huntsville, AL 35802
slawson@itcdeltacom.com

A handwritten signature in black ink, appearing to be "Nanette S. Edwards", written over a horizontal line.